STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 14, 2008
v	No. 276591 Wayne Circuit Court
ROD HOLMES, Defendant-Appellant.	LC No. 06-011565-01

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of interfering with a police investigation, MCL 750.483a(4)(b), carrying a concealed weapon (CCW), MCL 750.227, three counts of assault with intent to commit murder, MCL 750.83, three counts of felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of two to ten years for the interfering with a police investigation conviction, one to five years for the CCW conviction, 30 to 60 years for each of the assault convictions, and one to five years for each of the felon-in-possession convictions, to be served consecutive to concurrent sentences of two years' imprisonment for each of the felony-firearm convictions. He appeals by right. We affirm, but remand for amendment of the judgment of sentence to reflect that defendant's felony-firearm and CCW sentences shall be served concurrently.

Defendant's convictions arise out of a dispute between Curtis Bell and him that occurred on August 31, 2006. Bell was at his home in Detroit with Gary Jefferson and Brenda Patterson. Bell was sitting on his porch that evening when defendant pulled up and called Bell over to his car. Defendant got out of the car and punched Bell in the jaw, claiming that Bell "had some guys" steal defendant's van. Defendant and "George," who had been inside the car with defendant, then went into Bell's home and instigated a physical altercation with Jefferson. Patterson saw that George was carrying a gun and immediately left the house. She heard a gunshot as she was exiting through the back door. Jefferson was shot in the shoulder.

Bell called the police. As he was talking to police officers in front of his house, he heard rustling in the bushes and heard defendant say "Hey, Curt." He then heard two gunshots,[1] and he and the officers took cover. Shortly thereafter, the police observed defendant quickly leave his nearby home and speed away in his vehicle. Officers stopped the car and arrested him. The police recovered a semi-automatic handgun in the trunk of the car. They also recovered an assault rifle from the attic and a .44-caliber revolver from under a seat cushion during a search of defendant's home. Testing confirmed that the rifle was the weapon that was fired toward Bell and the officers outside Bell's home.

Defendant first argues that he was denied the effective assistance of counsel because defense counsel failed to timely seek suppression of the firearms found in defendant's home during a warrantless search of the home. We disagree. Because defendant failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, and this Court denied his motion to remand, our review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Id*. With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id*. at 302-303.

Defendant contends that trial counsel should have timely sought suppression of the firearms recovered at his residence because his elderly grandmother, Annie Killian, was incompetent to consent to the search of the home. It is undisputed that Killian owned the home and, therefore, had authority to consent to its search. See *People v Goforth*, 222 Mich App 306, 311-313; 564 NW2d 526 (1997). Rather, defendant challenges her capacity to consent to the search because she lacked the mental competence. "A consent to search permits a search and seizure without a warrant when the consent is unequivocal, specific, and freely and intelligently given." *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003). Whether a person's consent is valid depends on the totality of the circumstances. *Id.* A police officer's determination that consent is valid must be objectively reasonable. See *Illinois v Rodriguez*, 497 US 177, 185-186; 110 S Ct 2793; 111 L Ed 2d 148 (1990).

Here, the totality of the circumstances confirms that Killian's consent to search was valid. Sergeant Michael Jackson testified that he explained to Killian the allegations involving defendant and that he was looking for firearms because of the allegations. Killian acknowledged that she understood why he was at her home; she consented to Jackson's searching her home,

[1] The police officers testified that only one gunshot was fired.

and she signed the consent form. Further, she informed Jackson that there were weapons in the home and that they belonged to defendant. Although Killian's granddaughter wrote the "n" at the end of Killian's signature on the consent form and Killian testified at trial that she did not recall signing her name, she admitted that the signature on the form was hers. Moreover, although she testified that she did not recall the police being at her home and was unable to remember defendant's name at the time of trial, these factors have no bearing on her competency to consent to the search at the time of the search. These facts establish an objectively reasonable basis for believing that Killian's consent to search was valid. *Rodriguez*, *supra* at 185-186; *Galloway*, *supra* at 648.

Defendant next argues that there was insufficient evidence to support his assault with intent to commit murder convictions involving the two police officers because the doctrine of transferred intent is inapplicable when a completed crime is committed against an intended victim, and the unintended victims do not suffer physical injury. We disagree. When reviewing a claim of insufficient evidence, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Whether the doctrine of transferred intent is applies to the two police officers is a question of law that we review de novo. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005).

An assault with intent to commit murder is proved by establishing: (1) an assault, (2) with an actual intent to kill, (3) that would make the killing murder if successful. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). Further, under the doctrine of transferred intent, it is sufficient for a prosecutor to show that the defendant possessed the requisite intent; the prosecutor need not show that the defendant's intent to kill was directed toward a specific victim. *People v Abraham*, 256 Mich App 265, 270; 662 NW2d 836 (2003). Here, the evidence shows that defendant possessed the requisite intent to kill, so the prosecutor was not required to show that defendant's intent to kill was directed at the police officers in order to support his convictions of assault with intent to commit murder with respect to them.

This conclusion is consistent with *People v Lawton*, 196 Mich App 341; 492 NW2d 810 (1992). In that case, defendant Marcus Lawton was convicted of three counts of assault with intent to commit murder with respect to Truman May, Irene May, and LaTasha May. *Id.* at 344-345. He argued that the evidence was insufficient to convict him of the counts pertaining to Irene and LaTasha because he did not intend to kill either victim. *Id.* at 350. While outside Truman's home, Lawton fired shots at Truman, who was inside the home. Neither Truman nor Irene was struck, but LaTasha was hit by two bullets that penetrated the walls of the home while she was hiding with Irene in a bedroom closet. *Id.* at 345. This Court upheld Lawton's convictions involving all three victims, notwithstanding that Lawton may have intended to kill only Truman. *Id.* at 351. Significantly for purposes of the instant appeal, this Court upheld Lawton's conviction involving Irene although Irene was not an intended victim and did not suffer injury during the shooting. *Id.* Similarly, in the instant case, the evidence was sufficient to support defendant's convictions of the two counts of assault with intent to commit murder involving the police officers despite that they were not intended victims and were not injured.

Defendant next argues that the evidence was insufficient to support his convictions of felony-firearm with respect to the .44-caliber revolver recovered in his home and the semi-automatic handgun recovered from the trunk of his car. He contends that no evidence showed

that he possessed these weapons during the assaults with intent to commit murder or the interference with a police investigation and that the Legislature did not intend felon-in-possession to serve as the basis for a felony-firearm conviction. Whether a felon-in-possession conviction may serve as the predicate felony for a felony-firearm conviction is a question of law that this Court reviews de novo. *Jenkins, supra* at 31.

Defendant correctly argues that no evidence showed that he possessed the .44-caliber revolver or the semi-automatic handgun during the assaults with intent to commit murder or the interference with a police investigation. He was properly convicted of felony-firearm with respect to these weapons, however, because his felon-in-possession convictions regarding these firearms properly served as the bases for his felony-firearm convictions regarding the same weapons.

Defendant argues that *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007), rejected the reasoning of *People v Calloway*, 469 Mich 448; 671 NW2d 733 (2003), and *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001), which held that the language of the felony-firearm statute, MCL 750.227b, permits convictions of both felony-firearm and felon-in-possession because the felony-firearm statute does not exempt felon-in-possession as a predicate offense. Thus, defendant argues, those decisions are no longer binding. In *Smith, supra* at 316, however, our Supreme Court acknowledged that, for purposes of the multiple punishment strand of double jeopardy, "courts first look to determine whether the Legislature expressed a clear intention that multiple punishments be imposed." The Court held that if the Legislature clearly intended to impose multiple punishments, imposition of such punishments does not violate the constitution regardless of whether the offenses share the same elements. *Id.* Only where the Legislature's intention is not clearly expressed is it necessary to apply the *Blockburger*[2] "same elements" test to determine whether multiple punishments are permissible. *Id.* Thus, as determined in *Calloway, supra* at 451-452, and *Dillard, supra* at 166-168, because the plain language of the felony-firearm statute does not exempt felon-in-possession as a predicate felony, the Legislature has clearly conveyed its intent that felon-in-possession may serve as a predicate felony for a felony-firearm offense. Accordingly, it is unnecessary to apply the "same elements" test. Therefore, although our Supreme Court in *Smith* adopted the *Blockburger* "same elements" test, this holding does not undermine the soundness of *Calloway* and *Dillard* to the extent that those decisions focused on the plain text of the felony-firearm statute.

Defendant further argues that the rationale of *Calloway* and *Dillard* should not persuade this Court because neither case addressed the intent of the Legislature that enacted the felony-firearm statute in 1976 and because the felon-in-possession statute was not enacted until 1992, making it impossible to have been included in the list of exceptions contained in the felony-firearm statute. As recognized in *Dillard, supra* at 168, quoting *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993), "'the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws.'" Therefore, "had the Legislature wished to exclude the felon in possession charge as a basis for liability under the felony-firearm statute, the Legislature would have amended the felony-firearm statute

[2] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

to explicitly exclude the possibility of a conviction under the felony-firearm statute that was premised on MCL 750.224f." *Dillard, supra* at 168. The Legislature failed to do so. Accordingly, defendant's argument lacks merit.

Defendant next argues that the judgment of sentence must be corrected to order that his felony-firearm sentences be served consecutively only to those underlying felonies identified in the information and supported by sufficient evidence. We note that defense counsel expressly agreed during sentencing that defendant's felony-firearm sentences should run concurrently with each other and consecutively to all other sentences, thereby waiving any claim of error. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). As the prosecution concedes, however, defendant's CCW sentence cannot properly run consecutively to his sentences for felony-firearm; consequently, we remand this case to the trial court for the limited purpose of amending the judgment of sentence to reflect that defendant's sentences for these convictions run concurrently. See *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994).

We affirm but remand this case to the trial court for the limited purpose of amending the judgment of sentence to reflect that defendant's sentences for his felony-firearm and CCW convictions run concurrently. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot